STATE OF MICHIGAN

IN THE SUPREME COURT

FIRAS QARANA,

Plaintiff/Appellee,

v

NORTH POINTE INSURANCE COMPANY,

Garnishee Defendant/Appellant.

Lower Court Case No. 00-022528-NI
Court of Appeals Case No. 244797
Supreme Court Case No.127488

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GARNISHEE-DEFENDANT/APPELLANT NORTH POINTE'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

127488

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JUDGMENT OR ORDER APPEALED FROM

Pursuant to MCR 7.301(A)(2), Garnishee-Defendant/Appellant North Pointe Insurance Company (hereinafter "North Pointe"), seeks leave to appeal from the October 14, 2004, opinion of the Michigan Court of Appeals.[1]

[1]See **Exhibit A**, October 14, 2004, opinion of the Michigan Court of Appeals

RELIEF REQUESTED

Defendant North Pointe respectfully requests that this Court grant its Application for Leave to Appeal, or reverse the Court of Appeals decision and reinstate the trial court's order of summary disposition in favor of North Pointe.

STATEMENT OF QUESTIONS PRESENTED

I. WAS DEFENDANT REQUIRED TO USE "REASONABLE DILIGENCE" IN SECURING THE COOPERATION OF THE INSURED ?

Garnishee-Defendant/Appellant North Pointe says: ..... NO
Plaintiff/Appellee would answer: ..... Yes
Court of Appeals said: ..... Yes
Trial Court said: ..... NO

II. DOES THE EVIDENCE ESTABLISH "REASONABLE DILIGENCE" IN THE ATTEMPTS TO SECURE THE COOPERATION OF THE INSURED?

Garnishee-Defendant/Appellant North Pointe says: ..... YES
Plaintiff/Appellee would answer: ..... No
Court of Appeals said: ..... No
Trial Court said: ..... YES

III. DOES DEFENDANT NEED TO SHOW THAT IT WAS PREJUDICED BY THE NON-COOPERATION OF THE INSURED?

Garnishee-Defendant/Appellant North Pointe says: ..... NO
Plaintiff/Appellee would answer: ..... Yes
Court of Appeals said: ..... Yes
Trial Court said: ..... NO

IV. DOES THE EVIDENCE ESTABLISH "PREJUDICE" BY THE NON-COOPERATION OF THE INSURED?

Garnishee-Defendant/Appellant North Pointe says: ..... YES
Plaintiff/Appellee would answer: ..... No
Court of Appeals said: ..... No
Trial Court said: ..... YES

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LIST OF EXHIBITS

EXHIBITS:

Exhibit A	October 14, 2004, opinion of the Michigan Court of Appeals
Exhibit B	October 23, 2002 Circuit Court Order and Opinion Granting Summary Disposition in favor of North Pointe
Exhibit C	July 22, 2005 Order of the Michigan Supreme Court
Exhibit D	Insurance Policy Contract
Exhibit E	*Rory v Continental Insurance Company*, 473 Mich___;___ NW2d___ (decided July 28, 2005) Slip Opinion

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Underlying Action

A lawsuit was filed against the Royal Oak Music Theater by the plaintiff, Firas Qarana, who was allegedly involved in a bar fight on the sidewalk in front of the Royal Oak Music Theater. The plaintiff claims that another patron assaulted him, on the public sidewalk. The plaintiff alleged that the security personnel at the Royal Oak Music Theater failed to stop the fight. The plaintiff filed suit against the Royal Oak Music Theater, alleging negligence in failing to protect the plaintiff from his alleged assailant. Upon notice of the lawsuit, North Pointe, the insurance company for Royal Oak Music Theater provided defense counsel, Michael Ewing, to its insured. Royal Oak Music Theater failed to cooperate with defense counsel to defend the lawsuit.[2] The ultimate result was a default judgment entered against the Royal Oak Music Theater.[3] The chronology contained in the application for leave to appeal documents the underlying personal injury action.[4]

Garnishment Action

Plaintiff then pursued garnishment against North Pointe for the amount of the default judgment, filing a motion for summary disposition. North Pointe responded and filed a counter-

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2 See Exhibit V attached to North Pointe's Application for Leave to Appeal, Affidavit of Michael Ewing and Exhibit G attached to North Pointe's Application for Leave to Appeal, Deposition of Michael Ewing

3 See **Exhibit B**, Circuit Court Order and Opinion Granting Summary Disposition in favor of North Pointe, p. 2 and Chronology of events contained in North Pointe's Application for Leave to Appeal , p. 12

4 See Chronology of events contained in North Pointe's Application for Leave to Appeal , pp. 2-13. The chronology demonstrates, Mr. Ewing consistently attempted to obtain the insured's cooperation. Mr. Ewing's efforts, letters, correspondence and telephone calls are all evidence of his efforts. The insured, through its bankruptcy trustee, Mr. Shapiro, even accused Mr. Ewing of harassment, because he made numerous attempts in his efforts to gain the cooperation of the insured. Mr. Ewing's affidavit was submitted in the trial court record demonstrates the actions taken in his efforts to obtain cooperation of the insured.

motion for summary disposition.[5] Judge John McDonald of the Oakland County Circuit Court denied the plaintiff's motion for summary disposition and granted North Pointe's motion for summary disposition, in an opinion and order dated October 23, 2002.[6]

In granting North Pointe's motion for summary disposition, Judge McDonald held:[7]

> The Court finds that Garnishee-Defendant has stated a valid defense to the garnishment pursuant to *Coburn v Fox*, 425 Mich 300 (1986) and *Brogdon v AM Auto Ins. Co.*, 290 Mich 130 (1939). The breach of a cooperation clause constitutes a valid defense to payment under a non-mandatory indemnity policy. Here, **Paragon's lack of compliance with the policy's cooperation clause has been established by Mr. Ewing's affidavit concerning his withdrawal, and the failure to respond to discovery. It has been established that Paragon completely failed to cooperate with its defense**.
>
> * * * *
>
> The Court finds that North Pointe was prejudiced by Paragon's lack of cooperation and thus North Pointe is not obligated under the policy to satisfy the underlying judgment.
>
> Accordingly, plaintiff's motion for summary disposition is denied and defendant's motion for summary disposition is granted.

The Court of Appeals reversed the trial court's order granting summary disposition. The Court of Appeals held there was a genuine issue of fact as to whether the defendant insurer's efforts in obtaining the cooperation of its insured were diligent: [8]

> "In this case, reasonable minds could differ regarding whether North Pointe's efforts to secure Paragon's cooperation in

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5 See Chronology of events contained in North Pointe's Application for Leave to Appeal , pp. 2-13. See also Circuit Court Docket Entries

6 See **Exhibit B**, Circuit Court Order and Opinion Granting Summary Disposition in favor of North Pointe

7 See **Exhibit B**, Circuit Court Order and Opinion Granting Summary Disposition in favor of North Pointe

8 See **Exhibit A**, October 14, 2004, opinion of the Michigan Court of Appeals

defending the underlying action were diligent or whether they were minimal and perfunctory."

The Court of Appeals opinion also contains the following statements:[9]

> ". . . . the defendant has the added burden to then ultimately show that he was prejudiced by the noncooperation . . . ."
>
> "Under Michigan law, an insurer has the burden of showing noncooperation and that it was prejudicial."
>
> "It is undisputed North Pointe presented numerous proofs below to show a lack of cooperation by Paragon."
>
> ". . . . the insurer must use reasonable diligence in obtaining the insureds cooperation."
>
> "It is the combination of steps allegedly taken by the insurer, and the strength of the proof that they were, in fact, taken, which determines whether the efforts were diligent."

Garnishee Defendant/Appellant timely filed an application for leave to appeal.[10]

This Court issued its order on July 22, 2005 directing the Clerk to schedule oral argument on whether to grant Garnishee Defendant/Appellants application for leave to appeal or to take other peremptory action. The order also allows the parties to file supplemental briefs addressing the following questions: (1) whether defendant was required to use "reasonable diligence" in securing the cooperation of the insured; and, if so (2) whether a question of fact existed regarding whether defendant used "reasonable diligence" in securing the cooperation of the insured; (3) whether defendant must establish that it was prejudiced by the insured's non-

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9 See **Exhibit A**, October 14, 2004, opinion of the Michigan Court of Appeals

10 See Proof of Service for Application for Leave to Appeal

cooperation; and, if so (4) whether a question of fact existed regarding whether defendant was prejudiced by the insured's non-cooperation.[11]

Insurance Policy

Paragon Investment Company, d/b/a Royal Oak Music Theater, entered into an insurance contract with North Pointe Insurance Company.[12] The insured operated as a bar/night club in the city of Royal Oak. The case was a negligence case which might fall under the Royal Oak Music Theater's general liability insurance policy.

North Pointe issued the general liability insurance policy to Paragon Investment Company, d/b/a Royal Oak Music Theater. This is a contract between Paragon Investment Company d/b/a Royal Oak Music Theater and the North Pointe Insurance Company. The insurance contract provided, in relevant part, as follows:[13]

> SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS
> * * * *
> **3. Legal Action Against Us.**
>
> No person or organization has a right under this Coverage Part:
>
> a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
>
> b. To sue us on this Coverage Part unless all of its terms have been fully complied with.
>
> A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured obtained after an actual trial; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

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11 See **Exhibit C**, July 22, 2005 Order of the Michigan Supreme Court

12 See **Exhibit D**, Insurance Policy Contract

13 See **Exhibit D**, Insurance Policy Contract, (emphasis added).

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS
* * * *
2. Duties In the Event of Occurrence, Offense, Claim or Suit
a. You must see to it that we are notified as soon as practicable of an"occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or an offense took place;
(2) The names and addresses of any injured persons and witnesses; and
(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:
(1) Immediately record the specifics of the claim or "suit" and the date received; and
(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
(2) Authorize us to obtain records and other information;
(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
* * * *

The insurance contract clearly and unambiguously requires cooperation as one of the insured's obligations under the contract.

ARGUMENT

The issue in this case is whether the courts should treat an insurance contract different from any other contract, by writing in requirements to that contract which do not exist under the unambiguous language of the contract.

This Court issued an order directing the Clerk to schedule the matter for oral argument on the application for leave for appeal or allow the Court to take other peremptory action. This supplemental brief is being filed in accordance with This Court's Order issued July 22, 2005.[14]

Michigan Courts have long recognized that "an insurance policy is an agreement between parties that a court interprets "much the same as **any other** contract ". *Auto Owners Ins Co v. Harrington*, 455 Mich 377, 381(1997)(emphasis added), quoting *Auto Owners Ins Co v. Churchman*, 440 Mich 560, 566(1992).

When interpreting insurance policies under Michigan law, we are guided by a number of well-established principles of contract construction. Foremost among those is the maxim that an insurance **policy must be enforced in accordance with its terms**. *Twichel v. MIC General Ins. Corp.*, 469 Mich 524, 534 (2004); *Wilkie v. Auto Owners Ins. Co.,* 469 Mich 41, 51(2003); *Michigan Millers Mutual Ins Co v. Bronson Plating Co.*, 445 Mich 558,567(1994); *Upjohn Co v. New Hampshire Ins Co.*, 438 Mich 97,207 (1991). Where an insurance policy is unambiguous it is not open to construction and must be enforced as written. *Twichel v. MIC General Ins. Corp.*, 469 Mich 524, 534 (2004); *Auto Owners Ins Co. v. Churchman*, 445 Mich 560, 567 (1992). A court may not read ambiguities into a policy where none exist. *Auto Owners Ins Co v. Churchman*, 440 Mich 560,567(1992).

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[14] See **Exhibit D**, July 22, 2005 Order of the Michigan Supreme Court

I. DEFENDANT WAS NOT REQUIRED TO USE "REASONABLE DILIGENCE" IN SECURING THE COOPERATION OF THE INSURED

In its July 22, 2005 order, this Court has posed the question: "was defendant required to use "reasonable diligence" in securing the cooperation of the insured?" Because we are dealing with contractual relations, this question may be rephrased as: "is there anything in the contract between the parties which requires defendant to use "reasonable diligence" in securing the cooperation of the insured?" Of course, the answer is no. Quite to the contrary. The contract between the parties requires the insured, as a condition precedent to any payment by the insurer, to cooperate in its defense. The burden, imposed by the insurance contract, is on the insured, not the insurer.

This Court, just last month, reiterated Michigan law that contracts, including insurance contracts are to be enforced as written. *Rory v Continental Insurance Company*, 473 Mich___;____ NW2d____(decided July 28, 2005).[15] This Court also noted in *Rory*: " However, it is difficult to rationalize implementing the intent of the parties by imposing contractual provisions that are *completely antithetic* to the provisions contained in the contract."[16]

Once it is determined that the insured did not cooperate, the coverage question is answered. The trial court determined that the insured did not cooperate. The Court of Appeals agreed with this determination: "It is undisputed North Pointe presented numerous proofs below to show a lack of cooperation by Paragon."[17] The obligation of the insured to cooperate in the defense is a condition precedent to any obligation by the

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15 See **Exhibit E,** Slip Opinion attached

16 See **Exhibit E,** Slip Opinion, p. 5, n. 21

17 See **Exhibit A**, October 14, 2004, opinion of the Michigan Court of Appeals

insurance carrier. Conversely, there is nothing in the insurance contract that requires the insurer to use "reasonable diligence" to obtain the cooperation of the insured.

The cooperation clause in the contract is a condition precedent. "A condition precedent is a fact or event which the parties intend to exist or take place before there is a right to performance." *McDonald v. Perry*, 342 Mich 578, 586 (1955). This Court in *Knox v. Knox*, 337 Mich 109, 118 (1953) recited the general principles of contract law applicable to conditions precedent (citations omitted): "A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance . . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence."

The contract between the parties does not state that the insurer must use diligence (reasonable or otherwise) to obtain the cooperation of the insured. Rather the burden imposed by that contract is on the insured only in this respect-the requirement to cooperate in the defense as a precondition of the insurer's obligations.

The absurdity of enforcing the condition precedent contained in the contract (the obligation to cooperate) only after a demonstration of diligence by the insurer is amply shown in this case. In the garnishment action, plaintiff essentially stands in the shoes of the insured. The plaintiff can have no greater rights to recover under the contract than the insured. Imagine if the insured took a position as follows: "Granted, I did not cooperate and assist in the defense by providing the information that the insurance company requested, but I should have the benefit of the insurance contract anyway because the insurance company simply didn't do enough to cajole, persuade, threaten me to cooperate after I was sued."

The contract requires the insured to cooperate in the defense of the suit. It does not require the insurer to use diligence to obtain the cooperation. Nor does it require the insurer to expend additional resources to obtain information that would be obtained from a cooperating insured. The bargain made between the parties was that the insurer would pay up to its policy limits, but only under certain terms and conditions. One unambiguous condition contained in the contract is that the insured cooperate in its defense. If the insured does not cooperate in its defense, the insurer does not get the benefit of its bargain.

II. THE DEFENDANT DID USE "REASONABLE DILIGENCE" IN SECURING THE COOPERATION OF THE INSURED

Garnishee Defendant/Appellant will rely on its brief in support of its application for leave to appeal and specifically pages 4-12, which shows the efforts that were used to obtain the cooperation of the insured. Using "Monday morning quarterbacking", there is always something that somebody can conjure up after the fact that could have been done in addition to what was done. It should be noted, however, that this is not a case where the insured did not know of any requests to cooperate or the requirement to cooperate. This is a case of a willful refusal to cooperate. Because the insured filed bankruptcy and had no remaining assets or exposure to any assets in the event of a judgment, there was no desire to cooperate.

III. DEFENDANT DOES NOT NEED TO SHOW THAT IT WAS PREJUDICED BY THE NONCOOPERATION OF THE INSURED

The bargain struck between the parties was that the insurer would defend and indemnify the insured up to its policy limits under certain terms and conditions. One of those unambiguous conditions is that the insured must cooperate in the defense. The insurer has never agreed to pay under the contract without cooperation of the insured.

The contract contains no requirement that the insurer be "prejudiced" by the failure to cooperate in order to rely on the condition.

There is no doubt that prior Michigan decisions have imposed a "prejudice" requirement on insurers in order for there to be a denial of coverage for breach of the cooperation condition. It is respectfully submitted, however, that these decisions are inconsistent with general principles of contract law. Further, these decisions are inconsistent with this Court's recent holding in *Rory,* supra, that insurance policies are subject to the same contract construction principles that apply to any other species of contract and that unless the contract provision violates law or one of the traditional defenses to the enforceability of the contract, a court must apply unambiguous contract provisions as written.

This judicial addition of a "prejudice" requirement is particularly damaging to private parties' right to contract as they see fit because it is entirely unclear from the decisions that have adopted and perpetuated this requirement what it means to be "prejudiced" in this context. Does it mean that the insurer must engage in a metaphysical exercise of proving to the trier of fact exactly and precisely what would have happened had there been cooperation and that this exact outcome did not happen because of the non-cooperation of the insured? Who could ever meet such a standard of proof? On the other end of the scale, does it mean merely that the insurer had to spend more money to obtain information that could easily come from the insured had the insured cooperated? Both of these are forms a prejudice but are quite different in terms of a burden of proof.

The fact of the matter is, the cooperation condition is part of the contract so the insurer can avoid the expenses and problems associated with an insured that is not cooperating in its defense. By making a clear and specific requirement in the policy that

the insured cooperate in its defense, the parties have agreed that the cooperation requirement is a material and necessary component of the contract.

Most of the decisions which have adopted the prejudice requirement (and the Court of Appeals decision in this case) stem from the opinion in *Allen v. Cheathum*, 351 Mich 585 (1958). In that decision, this Court stated the following rule: "The Michigan rule is simply that where an insurer pleads non-cooperation, prejudice will not be presumed from a mere showing of non-cooperation, but the insurer must also introduce proofs tending to show an actual prejudice, and further and this is the nub of this case-that where the evidence on this score is conflicting, this Court will not disturb the finding of the trier of the facts if it is supported by competent evidence." *Allen*, at pp. 596, 597.

The *Allen* Court made no pretense of applying general contract principles to reach its conclusions. It clearly was formulating a rule that was applicable only to insurance contracts. The decision in *Allen* seems to be based on a curious mix of unusual facts and a willingness to completely depart from general contract principles. The Court seemed to confuse the issue of whether the facts demonstrated that the insured actually failed to cooperate with the consequences of a failure to cooperate. Obviously, in order to rely on the failure of the requirements of the cooperation condition to deny coverage, it must be demonstrated that there was an actual lack of cooperation. This is a completely separate question from whether the insurer must pay (or show prejudice) once a showing of lack of cooperation is made.

It is respectfully submitted that there is no way to reconcile the prejudice requirement (as formulated by the *Allen* Court) and this Court's decisions in *Rory*, supra, *Twitchell v. MIC General*, 469 Mich 424, 534 (2004) and *Wilkie v. Auto Owners*, 469 Mich 41, 51 (2003).

The *Allen* decision also suggests that the only way for an insurer to show prejudice is to actually have a trial on the merits of the original action. "In jurisdictions where a showing a prejudice is required, it is usually inevitable that the merits of the main case must be gone into to some extent when the defense of non-cooperation is raised. That is frequently the only way the trier of the facts can intelligently appraise and determine whether actual prejudice did or did not exist." *Allen* at p. 597. This of course begs the question, how does the insurer know of exculpatory information in the possession of the insured but not disclosed to the insurer because of non-cooperation? Without the cooperation of the insured, the insurer will never know of such information and cannot adequately demonstrate to a trier of fact what difference it would have made to the outcome in the original action. The contract between the parties wisely does not put such a burden on the insurer. As this Court stated in *Rory*:[18]

> "We reiterate the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law precludes such subjective post hoc judicial determinations of "reasonableness" as a basis upon which courts may refuse to enforce unambiguous contractual provisions."

In *Lee v. Auto Owners*, 218 Mich App 672 (1996), the Court of Appeals resisted the temptation to rewrite an insurance contract to impose a prejudice requirement. The *Lee* case involved the interpretation of an insurance contract containing uninsured motorist coverage. That contract precluded the insured party from entering into a release of a tortfeasor without the insurer's consent. The plaintiff took the position that in order to rely on its contract provision precluding the release, the insurer must show that it was prejudiced by the insured's actions. The court in *Lee*, finding that the insurance contract must be enforced as written, held that there was no need for the

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[18] See **Exhibit E,** Slip Opinion, p. 1

insurer to show prejudice resulted from the insured's violation of the contractual prohibition. The court held that it would not engraft into the contract a condition of prejudice. *Lee*, at p. 676.

IV. THE EVIDENCE ESTABLISHES "PREJUDICE" BY THE NON-COOPERATION OF THE INSURED

Prejudice will be found if an insurer's ability to contest its liability to an insured or the liability of the insured to a third party is "materially" impaired. *Wendel v. Swanberg*, 384 Mich 468(1971). This Court, in *Koski v. Allstate,* 456 Mich 439 (1998), held that the insured's cooperation in forwarding legal papers was a condition precedent to the insurer's liability on the policy.[19] As in the instant case, as a result of the insured's violation of the terms of the policy, the plaintiff obtained a default judgment. The plaintiff then filed a declaratory judgment action against Allstate in an attempt to obtain the proceeds of the default judgment from Allstate.

This Court held:

> In this case, plaintiff's duty to immediately forward any legal papers relating to a claim is a condition precedent to Allstate's liability under either policy. Ordinarily, one who sues for performance on a contractual obligation must prove that all contractual conditions pre-requisite to performance have been satisfied.

Koski, at p. 441.

As in the instant case, This Court noted in *Koski* that the insurer was deprived of the opportunity to engage in discovery to prepare a proper defense. This Court, accordingly, held that judgment should be entered in favor of the insurer. *Koski*, at 448. *In dicta,* this Court indicated that an insurer must establish actual prejudice to its position in order to deny

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[19] In *Koski*, the insured violated the provision of the policy which required the insured to notify the insurer of the action and to forward all legal paperwork to the insurer. See *Koski*, 441-442.

coverage. It does not appear as though that issue was ever presented to the Court, therefore, such dicta is not precedentially binding.

In response to any argument that the insurer was not prejudiced because they were aware of the default judgment before it became final, and could have taken steps to set the judgment aside, the *Koski* Court stated:

> "We believe that plaintiff overstates Allstate's ability to set aside the default judgment because it is far from certain that Allstate, standing in the shoes of plaintiff, Clinton established its entitlement to a new trial....[o]ur court has traditionally been strict, on setting aside default once regularly entered in such judgments have generally been regarded as mandatory." (Internal citations omitted).

Even if the Court, however, follows that requirement, as in *Koski*, it is clear that the defendant did establish actual prejudice. If North Pointe had obtained the cooperation of its insured, it could have defended the case. As a result of the insured's willful non-cooperation, a default judgment was entered against the insured.

This Court has held that "**[t]he rule seems to be well established that if a person contracts in an insurance policy to do certain things, he is required to do them.**" *Brogdon v. American Automobile Ins Co*, 290 Mich 130,135 (1939) (emphasis added).

A breach of the cooperation clause generally results in forfeiture of coverage, thereby relieving the insurer of its liability to pay, and provides the insurer an absolute defense to an action under the policy. *Flamm v. Scherer*, 40 Mich App 1 (1972).

> [Cooperation clauses] have been denominated as a **condition precedent** to liability under the contract or as a condition subsequent which may operate as a defeasance of a liability which is already attached. Such provision is a material part of the policy and a breach of the provision by the insured, in a material respect, constitutes a defense to liability on the policy, in the absence of waiver or estoppel of the insured.

44 Am Jur 2d Ins §130.

It is clearly the law in Michigan, as well as in most jurisdictions, that the conditions and terms of the insurance contract must be met in order for the insurer to be obligated to pay out insurance proceeds. A condition, such as a cooperation clause, is intended to force a party to the contract to meet that condition before there is a right to performance. *Sasanas v. Manufacturers National Bank of Detroit*, 130 Mich App 812 (1983).

The prejudice is established by the default judgment entered against the insured. The entry of the default judgment prevents the insurance company from having the "ability to contest its liability to an insured or the liability of the insured to a third party".

CONCLUSION

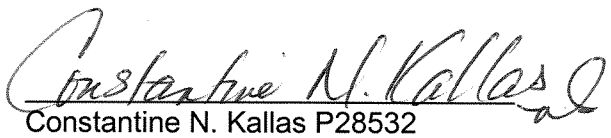
The Court of Appeals erred by requiring that Garnishee-Defendant/Appellant North Pointe Insurance Company demonstrate that it must show "reasonable diligence" in its efforts to obtain cooperation from the insured and that it was prejudiced by the insured's breach of contract. The Court of Appeals was similarly in error in requiring that the Garnishee-Defendant North Pointe Insurance Company must continue to perform its part of the bargain despite the insured's breach of contract, in contravention of long-standing Michigan contract law. Finally, even if the Court of Appeals correctly held that North Pointe must demonstrate "reasonable diligence" and prejudice and correctly held that the typical mutuality requirement of contract law is not required in the context of an insurance contract, the Court of Appeals nevertheless committed error by finding that there was an issue of fact created for the trier of fact as to whether the insured breached the cooperation clause of the contract so as to materially prejudice North Pointe.

RELIEF REQUESTED

Garnishee-Defendant/Appellant North Pointe Insurance Company respectfully requests that this Honorable Court grant its Application for Leave to Appeal, or, in the alternative to peremptorily reverse the Court of Appeals and remand back to the trial court for reinstatement of the trial court's opinion and order granting summary disposition in favor of North Pointe.

Respectfully submitted,

Kallas & Henk PC



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Dated: August 18, 2005